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BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-962

SAM GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-963

GERALD HAY KILGORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. No. 75-963, App. A) is reported at 518 F.2d 496. A supplementary opinion denying petitions for rehearing (Pet. No. 75-963, App. B) is reported at 524 F.2d 957.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1975. A petition for rehearing was denied on December 12, 1975. The petitions for a writ

of certiorari were filed on January 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to conduct an evidentiary hearing on the legality of a prior wire interception in which petitioners had been overheard, where the information obtained by the prior interception was not used to establish probable cause for the present interception.

2. Whether the affidavit and application for the interception order in this case contained sufficient evidence, independent of evidence secured through prior wire interceptions, to establish probable cause for the interception order. (Petitioner Green)

3. Whether the application for the interception order sufficiently established that other investigative procedures were inadequate. (Petitioner Green)

4. Whether the application for the interception order should have identified petitioner Kilgore as one whose communications were to be intercepted, and, if so, whether evidence obtained pursuant to the order should be suppressed as to him. (Petitioner Kilgore)

5. Whether the application for the interception order sufficiently set forth information concerning prior applications for interceptions, and whether an evidentiary hearing was necessary on this issue. (Petitioner Kilgore)

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted on twelve counts charging use of interstate telephone facilities to carry on an illegal gam-

bling operation, in violation of 18 U.S.C. 1952, and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Green was sentenced to concurrent terms of two years' imprisonment. Petitioner Kilgore was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. No. 75-963, App. A)[1] and denied rehearing in a supplemental opinion (Pet. App. B).

The evidence adduced at trial established that petitioner Kilgore transmitted line information by interstate telephone from California to petitioner Green in Florida, who supplied the information to local bookmakers. This evidence was derived primarily from a court-authorized wire interception of two telephones located in Green's residence in Florida.

ARGUMENT

1. Included in the affidavit (C.A. Ex. Vol., pp. 9-26)[2] submitted in support of the government's application for the wire interception order in this case were excerpts from transcripts of several conversations between petitioners Kilgore and Green that had been recorded during a previous court-authorized wire interception of telephones used by Kilgore in California. Petitioners contend (Pet. No. 75-962, pp. 7-17; Pet. No. 75-963, pp. 16-18) that the district court erred in refusing to hold an evidentiary hearing to determine whether the wire interception evidence in this case was tainted by the alleged illegality

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[1]All further "Pet. App." references are to the petition in No. 75-963.

[2]"C.A. Ex. Vol." refers to the exhibit volume filed in the court of appeals. "C.A. App." refers to the appendix filed in the court of appeals.

of the previous interception of telephones in California.[3] At a pretrial hearing, however, the district court found that there was sufficient evidence contained in the affidavit, even without the evidence derived from the California interception, to establish probable cause for the interception in this case (C.A. App. 27). As we show in point 2, *infra*, this conclusion of the district court was manifestly correct, and accordingly the district court properly determined that there was no need for an evidentiary hearing on the legality of the California interception. See *United States* v. *McHale*, 495 F.2d 15, 17-18 (C.A. 7); *United States* v. *Sterling*, 369 F.2d 799 (C.A. 3); *Clay* v. *United States*, 246 F.2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863.[4]

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[3]Petitioner Kilgore's contention that the district court should have held an evidentiary hearing apparently encompasses the broader claim that the hearing should have inquired into whether his name was improperly omitted from applications for other interceptions in California and for a previous interception conducted in Georgia, during which conversations of his were intercepted, and whether those interceptions should have been mentioned in the application in the instant case (see Pet. No. 75-963, pp. 12-16). We respond to this issue *infra*, pp. 12-14.

[4]Contrary to petitioner Green's assertion (Pet. No. 75-962, pp. 16-17), the instant case does not conflict with *United States* v. *Giordano*, 416 U.S. 505, or *United States* v. *Wac*, 498 F.2d 1227 (C.A. 6). The result in *Giordano* clearly turned upon the fact that the order there under consideration involved an *extension* of an improperly authorized initial application; the Court held that consideration of the prior interception was "essential * * * in fact and in law" to the authorization of the extension (416 U.S. at 533). Nor is this case like *Wac*, where the court found that consideration of evidence derived from a prior interception was "essential in fact" for the granting of an original application (498 F.2d at 1231); to the contrary, here the court specifically determined that

2. Petitioner Green asserts that, contrary to the conclusions of the courts below, the facts set forth in the affidavit (independent of the results of the California interception) were insufficient to establish probable cause for the wire interception order (Pet. No. 75-962, pp. 18-19). Green does not dispute that the independent evidence was sufficient to establish probable cause to believe that he was receiving and transmitting gambling information in violation of 18 U.S.C. 1952, or to believe that particular communications concerning that offense would be obtained through wire interception, as required by 18 U.S.C. 2518(3)(a) and (b). He argues, however, that the independent evidence was insufficient to establish probable cause as to the specific telephones that were monitored, as required by 18 U.S.C. 2518(3)(d).

Section 2518(3)(d) provides that the judge issuing the interception order must find, on the basis of the facts submitted, that

> there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

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the wire interception order was supported by independent probable cause.

Similarly, the court's refusal to grant Green an evidentiary hearing on the legality of the California wire interception mentioned in the application does not create a conflict with *United States* v. *Bellosi*, 501 F.2d 833 (C.A. D.C.), which involved the government's failure to inform the authorizing judge that one of the targets of the proposed interception had been the target of a previous application. That case did not involve the question whether and under what circumstances an evidentiary hearing would be required in connection with the alleged illegality of previous wire interceptions that the government did bring to the attention of the authorizing judge.

The independent information in the affidavit showed that petitioner Green had been receiving and disseminating gambling information, that the two telephones sought to be intercepted were located in his residence, that the telephones were listed in the names of members of his family and were billed to him, and that in a sixty day period over 110 long distance telephone calls were made from California to the two telephones sought to be intercepted (C.A. Ex. Vol., pp. 9-15, 23). As petitioner himself concedes (Pet. No. 75-962, p. 19), the evidence of these calls showed that "there was an unusual number of long distance telephone calls from California to Green's residence which may have referred to gambling." Coupled with the other independent evidence of Green's participation in gambling activities, this was sufficient to meet the requirements of 18 U.S.C. 2518(3)(d).

3. Petitioner Green argues further that the monitored conversations should have been suppressed because the intercept application failed sufficiently to establish the inadequacy of other investigative procedures (Pet. No. 75-962, pp. 19-23).

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*,

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *.

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c).

Pertinent decisions have stated, with only minor variation in particulars, the test to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[5] These decisions teach, in sum, that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and common sense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, December 1, 1975, No. 75-5330. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception. *In re Dunn*, 507 F.2d 195, 197 (C.A. 1). In short, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith*, 519 F.2d 516, 518 (C.A. 9)), and

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[5]*E.g.*, *United States* v. *Armocida*, 515 F.2d 29, 37-38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, October 6, 1975, No. 74-6683; *In re Dunn*, 507 F.2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F.2d 1007 (C.A. D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Curreri*, 388 F. Supp. 607, 618-622 (D. Md.), and cases cited therein.

his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

Assessed against the foregoing standards, the information provided in the affidavit in support of the application here was ample to support the finding of the issuing judge that "normal investigative procedures * * * reasonably appear to be unlikely to succeed * * * or [are] too dangerous." In brief, it was shown in the affidavit that several months of investigation involving the use of confidential informants and visual surveillance had not revealed the scope of Green's operation or fully established that petitioner Green was disseminating the line information he received from petitioner Kilgore to local bookmakers. The affiant further stated that, on the basis of his experience, testimony could not often be obtained from "customers" involved in gambling cases, telephone toll records would be insufficient to prove the offense, standard investigative techniques, such as surveillance, would be inadequate to develop evidence of the offense since the business was carried on by telephone, and searches to obtain gambling records were unlikely to succeed because of the infrequency with which such records were maintained and the difficulty in both obtaining and interpreting any such records when they were maintained (C.A. Ex. Vol., pp. 23-25).

This information sufficiently established the need for electronic surveillance to satisfy the requirements of Section 2518(1)(c). That section "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n.12. "Congress * * * did not attempt

to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he statute does not require the government to use a wire tap only as a last resort.' " *United States* v. *Smith, supra,* 519 F.2d at 518; *United States* v. *Kerrigan,* 514 F.2d 35 (C.A. 9), certiorari denied, November 3, 1975, No. 74-1629.[6]

It is possible that a conflict is emerging between the Ninth Circuit and other courts of appeals that have considered the question of the showing required by Section 2518(1)(c). Should such a conflict clearly develop, we believe the issue would probably be of sufficient importance to justify resolution by this Court. At the present time, however, there appears to be internal inconsistency within the Ninth Circuit regarding the issue, and there are pending requests for *en banc* consideration by that court. Accordingly, we believe that the question is presently not ripe for consideration by this Court.[7]

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[6]The legislative history confirms the conclusion that the provisions of 18 U.S.C. 2518(1)(c) were not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and common-sense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess., p. 101 (1968).

[7]A panel of the Ninth Circuit in *United States* v. *Kalustian,* No. 74-3314, decided August 4, 1975, opinion amended, December 11, 1975, petition for rehearing with suggestion for rehearing *en banc* filed October 14, 1975, appears to have imposed more stringent requirements for the showing under 18 U.S.C. 2518(1)(c) than Congress intended, or than have been required by any of the courts that have previously interpreted that section. A similar result was recently reached by a panel of the Ninth Cir-

4. Petitioner Kilgore contends that the evidence derived from the wire interception in this case should have been suppressed because the intercept application and order did not name him as a person "known" to be committing the offense although the government had probable cause to believe that his conversations would be overheard. He relies on 18 U.S.C. 2518(1)(b)(iv), which provides that the application should include "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

The question whether Section 2518(1)(b)(iv) requires the government to identify in the application for the intercept order all those who it has probable cause to believe will be overheard using the telephone in the commission of the described offense is presented in *United States* v. *Donovan*, No. 75-212, certiorari granted, February 23, 1976. In *Donovan*, we argue that the person who must be identified if known is the individual who leases or commonly uses the telephone being monitored, that is, the primary target of the interception.[8]

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cuit in an unpublished order in *United States* v. *Gross*, No. 75-2376, decided February 19, 1976, petition for rehearing with suggestion of rehearing *en banc* pending; and in *United States* v. *Pezzino*, No. 75-2305, decided January 23, 1976, petition for rehearing with suggestion of rehearing *en banc* pending, the panel followed the *Kalustian* test in finding that the affidavit in that case did satisfy the requirements of Section 2518(1)(c). Other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*. See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. There is at least one other case presently pending before the Ninth Circuit involving the same issue. *United States* v. *Pulliam*, No. 75-1383.

[8]We are sending petitioners a copy of our petitions in *Donovan* and *United States* v. *Bernstein*, No. 74-1486 (to which the *Donovan* petition refers).

Under that rationale, it was proper in this application and order to identify only Green as the person whose communications were to be intercepted. He was the prime target who was known to be committing the substantive offenses under investigation by means of the telephone to be intercepted. Although Kilgore was a person with whom Green could be expected to discuss his illegal activities on the intercepted telephone, that fact does not require that Kilgore be named in the application and order. His position in this respect is the same as that of those persons who were not named in the applications for the interceptions in *Donovan,* who also might have been expected to engage in conversations with the named target over the intercepted telephone line.

In any event, Kilgore was identified in the affidavit supporting the application, which was incorporated by reference into the application itself. The affidavit clearly set out the information the government possessed regarding his participation in the offense being investigated and informed the issuing judge of the probability that Kilgore would be overheard during the intercept. Therefore, by incorporating the information contained in the affidavit, the application satisfied the reading of Section 2518(1)(b)(iv) urged by petitioner and adopted by the court of appeals in *Donovan.* Cf. *United States* v. *Manfredi,* 488 F.2d 588, 598 (C.A. 2), certiorari denied, 417 U.S. 936.[9]

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[9]We recognize that, since the application named Kilgore but the order did not, the order technically failed to comply with 18 U.S.C. 2518(4)(a) if the naming of Kilgore was required by the statute. But where an individual is identified in the application, the omission of his name from the order is not a defect justifying suppression, since no congressional policies have been defeated by

For the foregoing reasons and those contained in our *Donovan* petition, we submit that the court below incorrectly assumed that the application failed to comply with the requirements of 18 U.S.C. 2518(1)(b)(iv). But we also submit that it was correct in holding that, if there was such a failure, it did not warrant suppression.

Nevertheless, since the issue whether the failure to identify a known person in an intercept order is grounds for suppression is pending in *Donovan*, this Court may wish to hold No. 75-963 (Kilgore's petition) until it has acted on that case. If the Court concludes in *Donovan* that a failure to name a known person warrants suppression of his intercepted conversations, Kilgore's claim should be remanded to the court of appeals to determine whether there was such a failure as to him.

5. 18 U.S.C 2518(1)(e) provides that each application for an interception order shall include:

> a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval

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the omission, and the defendant has not been prejudiced thereby. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 878-880 (C.A. 2), certiorari denied, 419 U.S. 1056. Thus the omission of the identity of Kilgore from the intercept order, where it was set out in the application incorporating the affidavit, is not the sort of violation of a statutory requirement that would render the interception unlawful, and hence suppressible, under 18 U.S.C. 2518(10)(a)(ii). *United States* v. *Giordano*, 416 U.S. 505, 527; *United States* v. *Chavez*, 416 U.S. 562, 575-580. Nor would suppression be required under traditional Fourth Amendment doctrines, since no constitutional rights were violated. The Fourth Amendment does not require that a warrant name the person whose "things [are] to be seized." *Berger* v. *New York*, 388 U.S. 41, 58-59. The things to be seized in this case were, of course, gambling conversations, which were particularly described in the order (C.A. Ex. Vol., pp. 27-31).

> of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application * * * .

Relying on this provision, petitioner Kilgore argues (Pet. No. 75-963, pp. 12-16) that the evidence from the surveillance of petitioner Green's telephone should have been suppressed because the government did not mention all of the previous wire interceptions of Kilgore's conversations and that he was entitled to an evidentiary hearing on this issue.[10]

If our position in *Donovan* is correct, however, then it was unnecessary to name Kilgore in the interception application in this case and his argument must fail, since the disclosure requirement of Section 2518(1)(e) extends only to "previous applications * * * involving [the] persons * * * *specified in the application*" (emphasis added).

If, on the other hand, the Court rejects our arguments in *Donovan*, then this case should be remanded with respect to petitioner Kilgore for a determination whether the government failed in the instant application to mention any previous applications in which Kilgore

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[10]Kilgore was not named in the applications for other interceptions in Georgia and California during which conversations of his were overheard. His argument that he was improperly denied an evidentiary hearing on the legality of all previous interceptions apparently includes, in addition to the claim raised by petitioner Green with respect to the California interception mentioned in the application (pp. 3-4, *supra*), the complaint that he was thereby precluded from proving "that he was a known but unidentified target in Georgia" (Pet. No. 75-963, p. 14).

should have been named, and for the further determination of the appropriate remedy in the event such a failure is found to have occurred.[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 75-962 should be denied and that action on the petition in No. 75-963 should be deferred and the petition disposed of in light of the decision in *Donovan*.

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APRIL 1976.

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[11]These determinations will be necessary, of course, only if we are correct in our assertion that the inclusion of Kilgore in the government's affidavit satisfied any naming requirement that the Court in *Donovan* might hold applies to applications in general.

BLEED THROUGH